LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
APR 28 1952
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1951

No. 669 31

UNITED STATES OF AMERICA ex rel.
JAMES SMITH,

Petitioner

v.

DR. FREDERICK S. BALDI, Superintendent
Philadelphia County Prison

On Certiorari to the United States Court of Appeals for the Third Circuit.

APPENDIX TO BRIEF OF THE ATTORNEY GENERAL OF PENNSYLVANIA FOR THE RESPONDENTS

FRANK P. LAWLEY, JR.,
Assistant Deputy Attorney General,
RANDOLPH C. RYDER,
Deputy Attorney General,
ROBERT E. WOODSIDE,
Attorney General.

State Capitol,
Harrisburg, Pennsylvania.

Murrelle Printing Company, Law Printers, 201-3 Lockhart St., Sayre, Pa.

INDEX TO THE APPENDIX

		PAGE
I.	Opinion, judgment and sentence of the Court of Oyer and Terminer of Philadelphia County at No. 384, February Term, 1948	2a
II.	Opinion, Supreme Court of Pennsylvania on the Direct Appeal at No. 137 January Term, 1949—Reported at 362 Pa. 222, 66 Atl. 2d 764	21a
III.	Return of Warden of Western State Penitentiary in the habeas corpus proceedings in the Supreme Court of Pennsylvania at No. 9 Miscellaneous Docket 302, Eastern District	30a
IV.	Petition by J. W. Claudy, Warden of Western State Penitentiary, for leave to intervene as party respondent in the District Court	34a
V.	Answer to petition	38a
VI.	Brief sur petition for leave to intervene	42a
VII.	Petition by the Attorney General of Pennsylvania to convene a full bench	66a
VIII.	Answer to petition to convene a full bench	70a

Case Caption

APPENDIX

I.

OPINION, JUDGMENT AND SENTENCE OF THE COURT OF OYER AND TERMINER OF PHILADELPHIA COUNTY AT NO. 384 FEBRUARY TERM, 1948

IN THE COURT OF OYER AND TERMINER OF PHILADELPHIA COUNTY

No. 384 February Term, 1948

Commonwealth of Pennsylvania

vs.

James Smith

Before Guerin, Sloane and Carroll, JJ.

Opinion of Court of Oyer and Terminer

Opinion by Guerin, J. (March 3, 1949):

Shortly after midnight, January 15, 1948, Edward G. Gundaker, Jr., a service man on a tow truck of a taxicab company, was proceeding northwardly on Delaware Avenue, above Bainbridge Street, in the City of Philadelphia, when he observed a taxicab of his employer cut across his path, traveling in a northeasterly direction on Delaware Avenue, at a speed of five to ten miles per hour, in a fashion that led the witness to believe that the brake was on and that it was coming to a stop. It did stop about twenty or thirty yards north of the tow truck. The witness seeing the defendant step from the driver's seat of the taxicab, halted his truck, grabbed a tire tool and approached the defendant on foot. The latter walked at a steady gait toward the witness, and when they met, Gundaker, noticing defendant's nervous condition, grasped him and asked him what was the matter. Defendant said the driver was sick, and Gundaker began walking toward the taxicab, while the defendant jerked and tried to get away. At that time, Barney Magen, driving a taxicab of another company, came up to them, and after an explanation by Gundaker, they looked into the first taxicab and saw the body of its driver, John J. Haines, lying on the front seat with his head toward the right door. On the front seat, to the left of the body of Haines, and approximately under the steering wheel, was a revolver. About two or three

minutes later, a police prowl car arrived at the scene, and Gundaker turned the defendant over to the custody of the police, who later proceeded with him to the police station. While in the police car, defendant dropped several bullets behind the rear seat. They were picked up by one of the officers, who turned them over to the detective division, but these bullets were not produced at the trial.

On the way to the station, one of the officers, who knew defendant, asked him why he had killed the man. Defendant said, "he isn't dead, is he?", and when the officer replied that he was, defendant exclaimed, "Oh, my God, what have I done now?"

Officer Malatesta, the driver of the police prowl car, questioned defendant before he was placed in the police car. Defendant first told him that he entered the cab at pier 46 and when it arrived at this point, the driver slumped. A moment later, he told Malatesta another story—that defendant and another fellow entered the cab at pier 98, and when they got that far, the other fellow got out and the driver slipped off. To this witness, defendant seemed perfectly sober and to know what he was doing.

After his arrival at the police station, defendant was questioned by Detective Lear. Defendant told him that he and another man, described as a Porto

Rican, were in the cab together and that the other man had shot the driver. The detectives took defendant over the territory and to the places described by him in search of the Porto Rican, but without success. Later, at the police station, the detectives questioned defendant further, and he admitted that he had shot the driver, taking his (defendant's) hat, holding it up and shooting through it to muffle the sound. The hat was found on the rear seat of the cab, and was offered in evidence, disclosing the bullet hole. Defendant later changed his story about the bullet hole in his hat, and said that it had been caused by the accidental discharge of the gun in his room at his home. His sister testified to the same effect. The detectives made a thorough search of defendant's room and found no evidence of a bullet hole in the walls or ceiling.

Detective Schwartz, of the homicide division, questioned defendant, and was told the same story about the Porto Rican in the cab, but, after appealing to defendant to tell the truth, since his asserted companion could not be found, defendant then confessed that he had shot the driver. His confession was reduced to writing and signed by him. It appears in toto in the transcript of testimony. Summarized, defendant related that a week before, he had obtained the revolver used in killing Haines as a part of the loot of a robbery in Camden, N. J.

When he brought it to Philadelphia, he purchased cartridges from a neighboring hardware store. The night before the killing, he took the revolver with him when he left home, because he needed some money and thought he would hold somebody up. After wandering through the neighborhood for several hours, in and out of cigar and candy stores, about midnight he went to 5th and South Streets and hired the cab at the stand. He told the driver to take him to Pier 98 (Delaware Avenue and Oregon Avenue), where he entered a cafeteria, ordered a bottle of beer, took a couple of swallows, left, and directed the driver to take him to Delaware Avenue and South Street (21 blocks away). As the cab turned the corner from Bainbridge Street into Delaware Avenue, defendant told the driver it was a hold-up. He pointed the gun at the driver, and as the latter bent over as if reaching for something, defendant shot him, jumped over to the front seat and brought the cab to a stop. He described in detail how he was taken into custody by the driver of the tow truck, and later by the police. He saw a police officer take the gun from the front seat of the cab, using a handkerchief to do so.

Defendant related that he had loaded the gun earlier in the evening after he left a restaurant, because he was going to stick up anybody that came by, as he needed money. It was loaded when he entered the cab at 5th and South Streets. He did

not intend to hold up the cab driver when he entered the cab, but after he left the cafeteria at Pier 98 and re-entered the cab, he had made up his mind to do so.

The spent bullet taken from the head of the deceased was fired from the revolver found on the cab seat, and identified by defendant as the one he had stolen a week prior, and had in his possession when he entered the cab.

The waybill of Haines was offered in evidence, and it recorded a "pick-up" of a passenger at the cab stand 5th and South Streets, but not his discharge, though entries thereon showed the pick-up and the discharge of all other passengers carried by Haines that night. No money or other property had been taken from Haines, and when defendant was searched he had only six cents in his possession.

Defendant took the witness stand and answered a number of questions put to him by his counsel concerning his childhood and his period of service in the army, but when questioned about the events of the night before, and the morning, Haines was shot, he remained silent, despite the repeated efforts of his counsel and the several members of the court to elicit a reply. Defendant constantly kept his chin on his chest, twisted his mouth, wet his lips, clenched and unclenched his hands and squirmed about on the witness chair. So pronounced was his

conduct that the court requested Dr. Drayton to sit in front of the courtroom and observe the defendant.

The court permitted counsel for defendant to state the result of their investigations and interviews with defendant. Defendant had told them that on the night before the killing, he had been to a bar and had something to drink, but did not remember how much; he returned to his home where he remained about an hour, leaving at 7:30 p.m. and taking the gun and bullets with him. He returned to the bar, had some wine and beer, went to another bar where he drank nothing but played the music machine, and then went to the home of a friend, Mildred Wheeler at 505 South Front Street. She set the time of his arrival at just a little after seven o'clock. She testified that defendant came to fix a bed for her. To her, he looked "dopey", and she saw a gun fall from his pocket while he was doing the work. She and a woman friend left defendant in the apartment, suggesting that he lie down before leaving. To the other woman, defendant looked normal. How long he remained there does not appear, but when he left he returned to the neighborhood of his home, had more beer in various taprooms and left to go home, but from that point on his mind has been a blank and still is. When his counsel asked him about what he told the police, defendant said if they saw him there, then he did it but could not remember how or why he did it.

There is nowhere in the record even a suggestion that any duress was practiced upon defendant to extort the confession he made. On the contrary, there is the uncontradicted evidence of the several police officers and the detectives that the confession was made voluntarily, after defendant had been warned of his rights, and at the time he gave every appearance of being sober, normal and knowing what he was saying and doing.

In June, 1945, defendant was arrested in Philadelphia on a charge of larceny of an automobile in New York City, and was returned to that jurisdiction for trial. At the trial, the Kings County Court committed defendant to the Division of Psychiatry of the Kings County Hospital. The latter submitted a written report to the court that defendant was insane, psychosis, schizophrenia, hebephrenic type, and that he was not capable of understanding the charge against him nor of making a defense. He was thereupon committed to the Brooklyn State Hospital on June 18, 1945.

Defendant remained at the Brooklyn State Hospital from June 19, 1945, to October 11, 1945, when he was discharged to be taken to the Department of Correction of the City of New York. The hospital record for that date notes as to defendant: "Condition: Recovered. Diagnosis: Dementia Praecox, Catatonic Type."

Dr. Clarence H. Bellinger, Senior Director of Brooklyn State Hospital, testified that upon admission, defendant was examined and the previous diagnosis was confirmed of dementia praecox, catatonic instead of hebephrenic. He was detained until October 11, 1945, during which time he improved, and was discharged after a personal examination by Dr. Bellinger, who stated that in his opinion defendant was sane, capable of understanding the charges pending against him, and of conferring with counsel in the making of his defense. He was discharged as having recovered from any mental illness he had—"he was clear and lucid."

December 27, 1945, defendant, on his own initiative, entered the Philadelphia General Hospital where he remained until January 4, 1946. At the time of his admission he was in an acutely hallucinatory state following excessive indulgence in alcohol the day before, when he began to hear voices, saw a "headless woman" standing at the foot of his bed, and once she sat on his head and caused his nose to bleed. He began to feel confused and was fearful he would attack and kill anyone who got in his way. He recognized this feeling was dangerous and called a patrol wagon to take him to the Naval Hospital, which sent him to the Philadelphia General Hospital.

At the Philadelphia General Hospital, defendant gave a history of service in the United States Army

from June 26, 1941, to June 29, 1944, when he received a medical discharge. He had served overseas and was a Staff Sergeant wice but was demoted for insubordination. While overseas he was hospitalized twice for a nervous condition and three times for malaria. He related that he was in the Brooklyn State Hospital, after stealing an automobile, having been discharged in 1945.

When defendant was first examined at the Philadelphia General Hospital there was no evidence of hallucinations. He was well oriented and seemed to have a fair amount of insight. He was cooperative and did not appear to be acutely ill. His physical examination and laboratory reports were essentially negative.

While confined to the Philadelphia County Prison (Moyamensing) he was examined by the Medical Director, Dr. Henry F. Page, on March 8, 1948, who reported that defendant was quiet, cooperative, lucid, oriented in all spheres, and in possession of insight into his predicament. He told Dr. Page that he reached grade 11-A in school and left to join the Army where he remained two years, receiving a disability discharge for malaria, and refusing a pension. Since then he had worked at various odd jobs and was then in the trucking business for himself. He stated that he had been arrested three times for stealing cars and twice on suspicion; that

he had no close friends and got along better with whites and foreigners rather than his own kind. He blamed the shooting of the cab driver on a fifth of sherry, on which he had superimposed several beers. At that time there was no evidence of an acute psychosis.

At the request of counsel for the defendant, the court asked Dr. William Drayton, Jr., to examine defendant. Dr. Drayton has been chief of the Philadelphia General Hospital psychiatric department since 1926; neuropsychiatrist of the Municipal Court of Philadelphia since 1922; and is associate professor of neuropsychiatry in the Graduate School of Medicine of the University of Pennsylvania. Dr. Drayton had two interviews with defendant, and testified that defendant was of average mentality.

His history of mental illness, diagnosed schizophrenia, catatonic type, and treatment at the Kings County Hospital and Brooklyn Hospital, as well as his confinement at the Philadelphia General Hospital was made known to Dr. Drayton. He testified that in his opinion defendant showed no evidence of having any psychosis at this time, nor did he believe that he was psychotic when he shot and killed Haines. He described defendant as having a convenient memory loss, and gave his diagnosis of defendant as of average intelligence, no psychosis, psychotically and neurologically negative. He ex-

pressed the opinion that defendant has completely recovered from his mental illness.

Dr. Drayton testified that in his opinion when defendant said he heard voices he was faking; that on January 15, 1948, when he killed Haines, defendant was capable of distinguishing between right and wrong, and of understanding what he was doing.

At the third hearing before the court, defendant sat twitching his lips, kept his eyes downcast, and constantly shifted about in his chair. This conduct was in marked contrast to his behavior at the two prior hearings, when he remained perfectly quiet and at least outwardly composed. On one occasion, he was directed to show tattoo marks to Dr. Bellinger, and he readily understood and followed the instructions of his counsel. Dr. Drayton's attention was called to defendant's actions, and he described them as an exhibition, and not the acts of an insane man.

The prison guard, who brought defendant to the courtroom four times and to Dr. Drayton twice, testified that on none of those occasions had defendant shaken his shoulders, rubbed his nose, and worked his hands and his lips as he had done in court on the third day of his trial. He walked, talked and behaved quietly and naturally.

Defendant was born February 2, 1925, and was twenty-three years old when he killed Haines. While

he did not enjoy the uninterrupted discipline of a father, who was separated off and on for a number of years from his mother, he lived with either parent, or with his maternal grandfather during his early youth. With him, lived his mother, step-brother and two sisters. His mother and one sister testified at his trial. At the age of five, he recovered from blindness accidentally suffered when a baby. As he grew, his behavior was normal and he got along well with his family and playmates. Sometimes he drank, but his mother did not often see him intoxicated. On one occasion, the date of which was not given, she came downstairs at 6:00 o'clock in the morning and saw him sitting on a chair and acting as he did on the third day of his trial.

March 6, 1947, defendant was placed on trial in Philadelphia on a charge of burglary. He had been found asleep in a neighborhood garage and was sentenced to thirty-two days to twenty-two months in the County Prison.

Defendant's sister testified that he drank two or three times a week if he had the money, and was addicted to smoking marihuana cigarettes. She saw him return to the house about 5:00 o'clock the evening before he shot Haines; he remained a few minutes, and went out again, but she did not observe his condition at the time.

While attending school in New Jersey, and when he was about the age of nine, he was arrested for

stealing a bicycle belonging to the daughter of his teacher, and was sent to a reform school for several months.

There is not the slightest room for doubt that this was murder of the first degree. The homicide was a felonious killing with malice aforethought, and, therefore, murder; and it was a murder committed in attempting to perpetrate a robbery, and hence murder of the first degree.

Defendant's counsel concede that the offense was murder of the first degree, but contend that a life sentence rather than death is warranted. In support of their position, they cite defendant's "mental history and his childhood buffetings and waywardness," and urge upon the court that if defendant was legally sane, he was mentally unhealthy and unstable. This contention completely overlooks the facts immediately preceding and leading up to the killing and defendant's arrest. There was nothing wrong with defendant's mental processes when he armed himself with the revolver and cartridges the night before he murdered Haines, with the intention as he confessed of holding up someone, because he needed money. He went to his friend's house and fixed her bed, and rested there awhile before setting out on his nefarious path which led to the cab driver's death. His mind was sufficiently acute for him to direct Haines to Delaware Avenue, probably one of the quietest and most deserted spots in Philadelphia

at midnight. He was alert enough to fire one shot in the back of the head, destroying the brain, making it improbable that it would arouse any who might by chance be passing by. He waited until the cab had slowed to 5 to 10 miles per hour, so that it would be a simple matter for him to climb into the front seat, turn off the ignition and bring the cab to a complete stop. Had it not been for the unexpected but timely presence almost immediately of Gundaker and Magen, he might have completed his murderous act and robbery and perhaps never have been brought to justice.

He was quick to recognize the futility of attempting to escape when he saw the tire wrench in Gundaker's hand, and was sharp enough to drop five bullets back of the seat of the police car. When questioned immediately at the scene of his crime, his mind was keen enough first to blame the killing upon a fictitious unknown companion who had escaped, and he admitted seeing the police officer pick the revolver from the cab seat using a handkerchief to do so.

We are more impressed with these natural, spontaneous evidences of defendant's mentality at the time he committed this crime, than we are with the vigorous, able and earnest efforts of counsel to cloak this defendant with a mantle of mental deficiency and irresponsibility based upon what might be termed isolated, or, at least, widely separated

periods of some degree of mental instability. We are strengthened in our belief that defendant was fully aware of the nature of his act by the opinion of Dr. Drayton that he now shows no evidence of psychosis, nor was he psychotic when he shot Haines, but was capable of distinguishing between right and wrong, and of understanding what he was doing. More than two years elapsed after defendant's discharge from the Brooklyn State Hospital as recovered, and it was just about two years after he had himself committed to the Philadelphia General Hospital for alcoholic hallucinosis, that he committed this crime. There is no evidence of institutional or medical treatment in this time, nor is there anything in the record to indicate the need thereof. At two hearings before this court, defendant was quiet, attentive and cooperative. As we have pointed out above, when asked to bare his arm for Dr. Bellinger, he instantly obeyed the instruction of counsel, stood, removed his coat, raised his sleeve, and resumed his seat after identification was made by Dr. Bellinger.

We accept the statement and opinion of Dr. Drayton, based upon his professional experience and contact with, and observation of, this defendant, buttressed by the evidence of our own senses, that this defendant is an exhibitionist, who faked abnormalities, and who suffers a convenient loss of memory. He knew well enough to relate in detail the

events of his past life, including the details of his Army experiences, to the doctors at the Kings County Hospital, Brooklyn State Hospital, Philadelphia General Hospital, Philadelphia County Prison, and to Dr. Drayton, but when asked about the murder and his confession, he affected not to remember anything about them.

In Commonwealth v. Taranow, 359 Pa. 342, defendant entered a plea of guilty to an indictment charging him with murder. The court en banc (composed of three judges) adjudged the crime to be murder in the first degree and fixed the penalty at death. From the evidence, it appeared that defendant shot and killed the driver of an automobile in motion, in which defendant had "thumbed" a ride. It was urged that life sentence should have been imposed by the lower court, rather than the sentence of death, because psychiatric experts had testified that defendant was emotionally unstable and a psychopathic personality. All witnesses agreed that at the time of the commission of the offense, and at the trial, defendant was sane. The Supreme Court rejected this contention, holding that the court below did not abuse its discretion when it fixed the death penalty, pointing out that defendant's alleged deviation from normal mentality was not such as to justify interposing a defense of insanity, and this carried with it an admission that defendant possessed the mental capacity necessary to enable him

to distinguish between right and wrong and sufficient to render him legally answerable for the consequences of his intended conduct. There, defendant's own detailed account of the killing and of his actions on the preceding day or two established beyond question that he was intent upon robbery by force of arms, if necessary—here, defendant's voluntary confession, reciting the taking of the revolver and bullets with him the night before, because he intended to hold up somebody since he needed some money, conclusively persuades the court of his wickedness of purpose.

Answering the contention that defendant's disrupted family background should mitigate the punishment for his offense, we quote the language of Chief Justice Maxey in his concurring opinion in Commonwealth v. Chapman, 359 Pa. 164, 172:

> "Most criminals have unfortunate family histories but society's need of protection from criminals regardless of their family history is the paramount consideration of the courts."

We have given this case our most earnest, serious, and extended thought and consideration. We are unanimously of the opinion that no mitigating circumstances have been shown which would warrant the imposition of less than the extreme penalty. On the contrary, defendant's conduct shows a reckless

disregard for the consequences, and callous, wanton destruction of human life.

The Act of June 24, 1939, P. L. 872, Sec. 701, 18 PS sec. 4701 provides that

> "In cases of pleas of guilty, the court, where it determines the crime to be murder of the first degree, shall, at its discretion, impose sentence of death or imprisonment for life."

We have determined the crime to be murder of the first degree, and, in the exercise of our discretion, have imposed sentence of death.

Opinion of Court of Oyer and Terminer
Judgment and Sentence

JUDGMENT AND SENTENCE

And now, Friday, February 4, 1949, the sentence of the law is that you, James Smith, be taken hence by the Sheriff of Philadelphia County to the jail of that county from whence you came, and from thence in due course to the Western Penitentiary in Centre County, Pennsylvania, and that you there suffer death during the week fixed by the Governor of the Commonwealth, in a building erected for the purpose on land owned by the Commonwealth, such punishment being inflicted by either the warden or deputy warden of the Western Penitentiary, or by such person as the warden shall designate, by causing to pass through your body a current of electricity of intensity sufficient to cause death and the application of such current to be continued until you are dead.

CHARLES L. GUERIN,
Judge.

II.

OPINION, SUPREME COURT OF PENNSYLVANIA ON THE DIRECT APPEAL AT NO. 137 JANUARY TERM, 1949

(Reported at 362 Pa. 222, 66 Atl. 2d 764)

In the Supreme Court of Pennsylvania

Eastern District

No. 137 January Term, 1949

Commonwealth

v.

Smith, *Appellant.*

Opinion by Mr. Chief Justice Maxey, June 24, 1949:

This is an appeal based upon alleged abuse of discretion by the court below in imposing the death penalty after appellant's plea of guilty of murder. James Smith pleaded guilty to an indictment charging him with the murder of John J. Haines on September 21, 1948, in Philadelphia. On the same

day he was adjudged guilty of murder in the first degree by the court en banc, composed of Judges Charles L. Guerin, Joseph Sloane and Vincent A. Carroll.

The victim, John J. Haines, was a taxicab driver. He was found shot through the back of his head, slumped on the front seat of his cab, bleeding, shortly after midnight, on January 15, 1948, on Delaware Avenue near South Street, Philadelphia. Edward G. Gundaker, Jr., was operating a tow truck in the vicinity when he saw appellant emerging from the cab, apprehended him, and turned him over to the police. Appellant admitted that he had shot Haines and signed a statement admitting that the gun he used in the killing was one he had obtained in a robbery in Camden, New Jersey; that around midnight on January 14th he determined to rob someone, hailed a cab, and, later, intending to rob the driver, shot and killed him. When he was asked: "When you told the cab driver that it was a holdup, did the cab driver say anything to you?" Smith answered: "No, sir. I had the gun pointed at him. He didn't say anything."

The defense called as a witness Dr. Fred Adams, a New York psychiatrist, connected with the Kings County Hospital, Kings County, New York. He testified that during May or June, 1945, at the request of the Kings County Court, he and Dr. Gladys

McDermaid, also a psychiatrist, examined appellant and diagnosed him as "psychosis. Schizophrenia. Hebephrenic type"; that this type of schizophrenia is a "mental disturbance characterized usually by illusions, delusions, hallucinations referable to the idea of persecution or grandeur"; that this diagnosis was aided by the findings of a psychologist, Dr. Samuel Machover. On the basis of these findings, they submitted to the Court that appellant was "presently insane, not imbecile and is not capable of understanding the charge against him, the proceedings against him and of making his defense". Defendant was then committed by the Court to the Brooklyn State Hospital for treatment of his mental condition. When questioned by the court Dr. Adams testified that when examined in 1945, the appellant did not know the difference between right and wrong.

Dr. Bellinger was also called by appellant. He is the Senior Director of Brooklyn State Hospital, in Brooklyn, New York. He testified that hospital psychiatrists examined the appellant and substantially confirmed the previous diagnosis, except that they concluded the type to be catatonic rather than hebephrenic. Dr. Bellinger stated that appellant was detained until October 11, 1945, "when he was discharged to the Department of Correction of the City of New York after I had personally examined him and found him to be, in my opinion, sane and capable of understanding the charges pending

against him and of conferring with counsel in the making of his defense [for stealing an automobile]. I reported of record that I examined this young man myself on the 9th of October and I certified to the Committing Judge and the District Attorney of Kings County the fact that he had recovered to the extent that he was able to confer with counsel, understand the nature of the charges against him, and he was discharged to the Department of Correction as having recovered from any mental illness which he had. He was clear and lucid." Dr. Bellinger also stated that appellant, when discharged on October 11, 1945, "was cured and knew the difference between right and wrong".

By agreement and order of the Trial Court, a letter from the Philadelphia General Hospital was received in evidence. It refers to appellant's admission to the psychopathic Department in December 1945. This letter, dated April 28, 1948, which is signed by Dr. Albert J. Kaplan, Assistant Chief of Neuropsychiatric Department, says James Smith (this appellant) "was admitted in an acutely hallucinatory state following excessive indulgence in alcohol the day prior to admission." The letter states that: "His past history reveals that he was in the Army from 6-26-41 to 6-29-44, and he was discharged for medical reasons (probably nervousness; actual cause unknown). He had served overseas in the C. B. I. theatre of operation, was a

Staff Sergeant twice but was demoted because of insubordination. While overseas he was hospitalized twice because of 'nervous observation' for a nervous condition and three times for malaria." The letter continues: "When first examined in this hospital, there was no evidence of hallucinations. Patient was well oriented and seemed to have a fair amount of insight. He was cooperative and apparently did not appear acutely ill." The letter refers to a note by the Assistant Chief of Service, Dr. A. Leanman, which has the following comments: "Patient has heard two voices since 1943; one tells him to 'do good' and the other tells him to 'do bad'. He has amnesia periods when he finds himself in different parts of town at which time he wants to hurt someone (admission note says he is homicidal). He gets into fights easily. He states he was in the Army for three years, overseas two years, got into minimum trouble. Recently released from Brooklyn State Hospital for 'same thing; they said I took an automobile but I don't remember it.'"

At the request of Judge Guerin the defendant had been examined a few days before November 5, 1948, by Dr. William Drayton, Jr., and his testimony is as follows: "The guard in number four block at the Holmesburg Prison told me, over the telephone, that he acts in a normal manner, is pleasant and cooperative. Smith has a convenient memory loss. He shows no evidence of having any psychosis at

this time, nor do I believe that he was psychotic when he shot and killed John J. Haines . . .." When Dr. Drayton was asked: "What is your diagnosis?", he answered: "He is of average intelligence, no psychosis; psychotically and neurologically negative." Dr. Drayton said that as far as he could tell, the defendant had completely recovered from any mental illness of which there had been any prior history. He was asked: "At the time you examined him did he appreciate the difference between right and wrong?" His reply was: "he answered my question, 'What happens to a person who kills,' life for life. He said wrong to kill and he said he didn't kill anybody." When asked: "Would you say this man when he says he hears voices is a faker?", he replied: "I think he is a faker." When asked: "You are not quite entirely convinced that this man is sane?", he replied: "I believe that he is sane." Judge Carroll asked Dr. Drayton the following question: "In your professional opinion was this man, on January 15, 1948, capable of distinguishing between right and wrong?" He replied: "I believe he was."

The court in its opinion in this case said, inter alia: "Defendant's counsel concede that the offense was murder of the first degree, but contend that a life sentence rather than death is warranted. In support of their position, they cite defendant's 'mental history and his childhood buffetings and

waywardness,' and urge upon the court that if defendant was legally sane, he was mentally unhealthy and unstable. This contention completely overlooks the facts immediately preceding and leading up to the killing and defendant's arrest. There was nothing wrong with defendant's mental processes when he armed himself with the revolver and cartridges the night before he murdered Haines, with the intention as he confessed of holding up someone, because he needed money. He went to his friend's house and fixed her bed, and rested there awhile before setting out on his nefarious path which led to the cab driver's death. His mind was sufficiently acute for him to direct Haines to Delaware Avenue, probably one of the quietest and most deserted spots in Philadelphia at midnight. He was alert enough to fire one shot in the back of the head, destroying the brain, making it improbable that it would arouse any who might by chance be passing by. He waited until the cab had slowed to 5 to 10 miles per hour, so that it would be a simple matter for him to climb into the front seat, turn off the ignition and bring the cab to a complete stop. Had it not been for the unexpected but timely presence almost immediately of Gundaker and Magen, he might have completed his murderous act and robbery and perhaps never have been brought to justice. He was quick to recognize the futility of attempting to escape when he saw the tire wrench in Gundaker's hand, and was

sharp enough to drop five bullets back of the seat of the police car. When questioned immediately at the scene of his crime, his mind was keen enough first to blame the killing upon a fictitious unknown companion who had escaped, and he admitted seeing the police officer pick the revolver from the cab seat using a handkerchief to do so."

The court then said: We are strengthened in our belief that defendant was fully aware of the nature of his act by the opinion of Dr. Drayton that he now shows no evidence of psychosis, nor was he psychotic when he shot Haines, but was capable of distinguishing between right and wrong, and of understanding what he was doing. More than two years elapsed after defendant's discharge from the Brooklyn State Hospital as recovered, and it was just about two years after he had himself committed to the Philadelphia General Hospital for alcoholic hallucinosis, that he committed this crime. There is no evidence of institutional or medical treatment in this time, nor is there anything in the record to indicate the need thereof. At two hearings before this court, defendant was quiet, attentive and cooperative. As we have pointed out above, when asked to bare his arm for Dr. Bellinger, he instantly obeyed the instruction of counsel, stood, removed his coat, raised his sleeve, and resumed his seat after identification was made by Dr. Bellinger." The court concluded with this statement: "We have determined the

crime to be murder of the first degree, and, in the exercise of our discretion, have imposed sentence of death."

We find no abuse of discretion in this case. The judgment is affirmed and the record is remitted to the court below so that the sentence imposed may be carried out.

III.

RETURN OF WARDEN OF WESTERN STATE PENITENTIARY IN THE HABEAS CORPUS PROCEEDINGS IN THE SUPREME COURT OF PENNSYLVANIA AT NO. 9 MISCELLANEOUS DOCKET 302, EASTERN DISTRICT

In the Supreme Court of Pennsylvania
Eastern District

No. 302 Misc. Docket No. 9

Commonwealth, ex rel. James Smith

v.

Stanley P. Ashe, Warden, Western State Penitentiary, and Dr. Frederick S. Baldi, Superintendent Philadelphia County Prison

---

RETURN BY WARDEN OF WESTERN STATE PENITENTIARY

And now, this 6th day of December, 1949, comes Stanley P. Ashe, Warden, Western State Penitentiary and makes the following return:

1. That he is Warden of Western State Penitentiary.

2. That James Smith was received into his custody at the Rockview Prison, Western State Penitentiary, Rockview, Centre County, Pennsylvania, on September 24, 1949, pursuant to a judgment and sentence of the Court of Oyer and Terminer of Philadelphia County, Pennsylvania, at No. 384 February Term, 1948, and the warrant of the Governor of Pennsylvania issued pursuant to the provisions of the Act of June 19, 1913, P. L. 528, 19 PS Section 1121 et seq.

3. That pursuant to a writ of habeas corpus issued by the United States District Court for the Eastern District of Pennsylvania at Misc. No. 1334, the said James Smith was procured by your affiant before said Court on Tuesday, October 4, 1949.

4. That pending the disposition of the said habeas corpus proceedings in the said United States District Court the relator, pursuant to the Order of said Court, was confined in the Philadelphia County Prison.

5. That the said Court dismissed the said writ of habeas corpus.

6. That James Smith served notice of his intention to perfect an appeal from the said Order of the said United States District Court to the United States Court of Appeals for the Third Circuit, upon the Attorney General of Pennsylvania, counsel for your affiant.

7. That on the 22nd day of November, 1949, the United States District Court for the Eastern District of Pennsylvania entered an Order remanding the said James Smith into the custody of the Warden of the Philadelphia County Prison, and that the said James Smith is there confined, pursuant to said Order.

8. That attached hereto and made a part hereof, is the original record of the Court of Oyer and Terminer, Philadelphia County, Pennsylvania, at No. 384 February Term, 1948, and a copy of the record of the appellate proceedings before your Honorable Court at No. 137 January Term, 1949, sub nom Commonwealth v. James Smith, and a true and correct copy of the record of the proceedings before the United States District Court for the Eastern District of Pennsylvania, sub nom United States ex rel. James Smith v. Warden Western State Penitentiary.

(s) STANLEY P. ASHE,
Warden, Western State Penitentiary.

Commonwealth of Pennsylvania
County of Dauphin ss:

Before me, a Notary Public in and for said State and County, personally appeared Stanley P. Ashe,

Warden of Western State Penitentiary, who being duly sworn according to law deposes and says that the facts alleged in the foregoing Return are true and correct, to the best of his knowledge, information and belief.

(s) STANLEY P. ASHE,
Warden, Western State Penitentiary.

Sworn to and subscribed before me this 1st day of December, 1949.

(s) Lucille A. Stroup,
(Seal) *Notary Public.*

My Commission expires Mar. 5, 1951.

IV.

PETITION BY J. W. CLAUDY, WARDEN OF WESTERN STATE PENITENTIARY, FOR LEAVE TO INTERVENE AS PARTY RESPONDENT IN THE DISTRICT COURT

In the United States District Court
(Eastern District of Pennsylvania)

No. 1408

United States of America ex rel. James Smith
v.
Dr. Frederick S. Baldi, Superintendent,
Philadelphia County Prison

PETITION FOR LEAVE TO INTERVENE AS RESPONDENT

To the Honorable, the Judges of Said Court:

The petition of J. W. Claudy, Warden of the Western State Penitentiary by Charles J. Margiotti,

Attorney General of Pennsylvania, respectfully represents:

1. That J. W. Claudy is the Warden of the Western State Penitentiary.

2. That on the 20th day of July, 1949, Honorable James H. Duff, Governor of Pennsylvania, issued a warrant to Stanley P. Ashe, Warden of the Western State Penitentiary, to execute, during the week beginning Monday, the 26th day of September, 1949, a sentence of death imposed upon the relator in this proceeding by the Court of Oyer and Terminer of Philadelphia County on an indictment at No. 384 February Term 1948, charging murder.

3. That the relator was delivered into the custody of the Warden of the Western State Penitentiary at Rockview, Centre County, Pennsylvania, on Saturday, the 24th day of September, 1949.

4. That on the same day, to wit, Saturday, the 24th day of September, 1949, your Honorable Court in proceedings at No. M1334, granted a writ of habeas corpus to the relator, stayed execution and ordered his production before your Honorable Court on Tuesday, the 4th day of October, 1949.

5. That in obedience to the order of your Honorable Court, the relator was produced by the Warden of the Western State Penitentiary, Stanley P. Ashe, before your Honorable Court on Tuesday, the

4th day of October, 1949, as directed in the said order.

6. That by order of your Honorable Court, the relator was placed in the custody of the Warden of the Philadelphia County Prison pending termination of the proceedings at No. M1334, supra.

7. That thereafter your Honorable Court entered an order discharging the writ which order was appealed to the United States Court of Appeals for the Third Circuit at No. 10141, which affirmed the order of your Honorable Court discharging the writ.

8. That although the order of your Honorable Court remanding the relator to the custody of the Warden of the Philadelphia County Prison pending termination of the proceedings at No. M1334 was automatically dissolved when the Circuit Court of Appeals affirmed the order of your Honorable Court discharging the writ, the relator was left by the Warden of the Western State Penitentiary, Stanley P. Ashe, at the Philadelphia County Prison pending the termination of habeas corpus proceedings instituted in the Supreme Court of Pennsylvania for the reason that it was believed to be a more humanitarian course than to return the relator to the "death house" at Rockview, Centre County, Pennsylvania.

9. That the petitioner, J. W. Claudy, is, under the laws of the Commonwealth of Pennsylvania, the

legal custodian of the relator and, therefore, has the paramount right to his custody.

Wherefore the petitioner prays your Honorable Court for leave to intervene as a respondent in the above captioned cause. And he will ever pray, etc.

(s) CHARLES J. MARGIOTTI,
Attorney General of Pennsylvania,

By: (s) RANDOLPH C. RYDER,
Deputy Attorney General.

V.

ANSWER TO PETITION

In the United States District Court for the Eastern District of Pennsylvania

---

No. 1408

United States of America
ex rel. James Smith
v.
Dr. Frederick S. Baldi, Superintendent,
Philadelphia County Prison

ANSWER TO PETITION FOR LEAVE TO INTERVENE AS RESPONDENT

To the Honorable, the Judges of Said Court:

James Smith, Relator, by his attorney, Thomas D. McBride, makes Answer as follows:

1. Admitted.
2. Admitted.

3. Admitted, with the qualification that Relator was not delivered into the custody of the Warden of the Western State Penitentiary on September 24, 1949 until some time after this Court had on the same day issued a writ of habeas corpus directing that the body of Relator be produced before this Court; and with the further qualification that at the moment the writ issued Relator was still in the custody of agents of the Superintendent of the Philadelphia County Prison, Dr. Frederick S. Baldi, and Dr. Baldi was at said time within the Eastern District of Pennsylvania.

4. Admitted.

5. Admitted.

6. Admitted.

7. Admitted, with the qualification that the writ was discharged on the ground that this Court lacked territorial jurisdiction, Relator having been beyond the territorial limits of the Eastern District of Pennsylvania at the moment the writ issued.

8. It is admitted that Relator remained at the Philadelphia County Prison and is still there. It is further admitted that it would have been inhumane to return Relator to the death house at Rockview, Centre County, Pennsylvania, under the circumstances. Relator denies that either these averments of fact or the conclusions of law stated in paragraph 8 of the petition are material.

9. Relator does not know what is meant by the statement that petitioner, J. W. Claudy, "has the paramount right to" Relator's custody, but it is denied that the said J. W. Claudy has any right whatever to Relator's custody. At the time Relator filed his petition and since then up until the present moment, Relator was and is being held by Dr. Frederick S. Baldi, Superintendent of the Philadelphia County Prison at said Prison, which is within the territorial jurisdiction of your Honorable Court.

10. It is averred that on October 9, 1950, this Court issued a rule to show cause why a writ of habeas corpus should not be granted to Relator and that on that same day a copy of this rule was served upon Dr. Frederick S. Baldi, Superintendent of the Philadelphia County Prison in whose custody Relator then was and is, directing him to produce the body of the Relator before this Court.

Wherefore Relator prays your Honorable Court to deny petitioner leave to intervene.

JAMES SMITH,
By: THOMAS D. MCBRIDE.

Commonwealth of Pennsylvania,
County of Philadelphia ss:

Thomas D. McBride, being duly sworn according to law, deposes and says that he is attorney for

Relator, and that the facts set forth in the foregoing Answer are true and correct.

(s) THOMAS D. MCBRIDE.

Sworn to and subscribed before me this 26th day of October, A. D. 1950.

Martha A. Rau,
Notary Public.

My commission expires January 7, 1951.

VI.

BRIEF SUR PETITION FOR LEAVE TO INTERVENE

In the United States District Court
For the Eastern District of Pennsylvania

No. 1408

United States of America ex rel. James Smith
Relator

vs.

Dr. Frederick S. Baldi, Superintendent of
Philadelphia County Prison
Respondent

BRIEF SUR PETITION OF WARDEN OF WESTERN STATE PENITENTIARY FOR LEAVE TO INTERVENE AS RESPONDENT

STATEMENT

This is a Petition by J. W. Claudy, Warden of the Western State Penitentiary for leave to intervene

as a party respondent in the above captioned cause —a habeas corpus proceeding challenging the constitutional validity of a criminal judgment pursuant to which the relator had been delivered to the petitioner for the execution of the sentence of death imposed on the judgment which execution was interrupted by litigation in this court and in the Supreme Court of Pennsylvania and the Supreme Court of the United States.

The relator was sentenced to death on an indictment in the Court of Oyer and Terminer of Philadelphia County at No. 384 February Term, 1948 (see Exhibit 1). The judgment and sentence was affirmed by the Supreme Court of Pennsylvania in an opinion reported at 362 Pa. 222, 66 Atl. 2d 764. The Governor of Pennsylvania issued a warrant to the Warden of the Western State Penitentiary directing him to carry out the sentence imposed by the Court of Oyer and Terminer of Philadelphia County during the week of September 26, 1949 (see Exhibit 2). The Pennsylvania Board of Pardons, on September 21, 1949, denied an application for commutation of the death sentence. On the following day, the Warden of the Western State Penitentiary directed the Superintendent of the Philadelphia County Prison to deliver the relator into his custody at the electrocution building of the Western State Penitentiary, Rockview, Centre County, Pennsylvania, where "He shall remain until the penalty of

death has been legally inflicted or until lawfully discharged from my custody" (see Exhibit 3). The relator was received into the custody of the Warden of the Western State Penitentiary at Rockview, Centre County on September 24, 1949 (see Exhibits 4 and 5).

On the same day, to-wit, September 24, 1949, the United States District Court for the Eastern District of Pennsylvania, per Welsh, District Judge, granted a writ of habeas corpus at M. 1334, directing the Warden of Western State Penitentiary to produce the relator before your Honorable Court at Philadelphia on October 4, 1949 (see Exhibit 6). This writ was complied with by the Warden of the Western State Penitentiary. On that date, after a hearing before the court en banc, Chief Judge Kirkpatrick, announced orally from the bench that the relator would be remanded to the custody of the Warden of the Philadelphia County Prison pending termination of the proceeding at M. 1334.

The writ was subsequently discharged (see 87 F. Supp. 339), and the relator was "remanded to custody" (see Exhibit 7). Thereafter, on November 22, 1949, Chief Judge Kirkpatrick entered an order remanding the relator into the custody of the Warden of the Philadelphia County Prison pending review of the judgment of your Honorable Court by the Circuit Court of Appeals (see Exhibit 8).

The judgment of the District Court was affirmed (see 181 F. 2d 847). In the meantime, habeas corpus proceedings were instituted in the Supreme Court of Pennsylvania at Misc. Docket 9, No. 302 against Stanley P. Ashe, Warden of the Western State Penitentiary and Dr. Frederick S. Baldi, Superintendent of the Philadelphia County Prison. The writ was refused (see 364 Pa. 93, 71 Atl. 2d 107) and certiorari denied by the Supreme Court of the United States on Monday, October 9, 1950[1] and on the same day, viz., October 9, 1950 the instant proceedings were instituted against Dr. Frederick S. Baldi, Superintendent of the Philadelphia County Prison. District Judge Welsh issued a Rule To Show Cause and granted a stay of execution of the sentence.

Following a receipt of a copy of the Petition and Rule, a Petition was filed by the Attorney General of Pennsylvania in behalf of J. W. Claudy, Warden of the Western State Penitentiary for leave to intervene as a party respondent. The relator has filed an Answer praying that the Petition for leave to intervene be dismissed.

---

[1] The relator was permitted, for humane reasons to remain at the Philadelphia County Prison pending the termination of the proceedings in the Supreme Court of the United States to secure a review of the decision of the Supreme Court of Pennsylvania at Misc. Docket 9, No. 302.

QUESTION PRESENTED

Whether the Warden of the Western State Penitentiary to whom a prisoner convicted of murder and sentenced to death has been delivered for execution of the sentence which was interrupted by proceedings in the United States District Court for the Eastern District of Pennsylvania and the Supreme Court of Pennsylvania and the Supreme Court of the United States during which the prisoner was detained in the Philadelphia County Prison part of the time under orders of the Federal Courts and part of the time (i.e. after the termination of the proceedings in the Federal Courts (April 26, 1950) and while the Supreme Court of the United States had under consideration the application for certiorari) for humane reasons, should not be allowed to intervene, as a party respondent, in a habeas corpus proceeding in the United States District Court for the Eastern District of Pennsylvania challenging the validity of the criminal judgment pursuant to which the prisoner was initially delivered into his custody?

STATUTES INVOLVED

Act of the General Assembly of Pennsylvania of June 19, 1913, P.L. 528, 19 PS 1121-1130.

"Section 1. Be it enacted, &c., That every person, his aiders, abetters, and counsellors, hereafter convicted of the crime of murder of the first degree, shall be sentenced to suffer death in the manner herein provided, and not otherwise. Such punishment, in every case, must be inflicted by causing to pass through the body of the convict a current of electricity of intensity sufficient to cause death, and the application of such current must be continued until such convict is dead. The said punishment shall be inflicted by the warden or deputy warden of the Western penitentiary, or by such person as the warden shall designate, and shall be inflicted in a building to be erected on the land owned by the Commonwealth in Centre County, whereon the buildings of the now Western Penitentiary are to be Built." 19 PS 1121.

"Section 2. Whenever any person shall have been convicted and sentenced to death, the clerk of the court where such conviction shall have taken place shall transmit to the Governor of the Commonwealth a full and complete transcript of the record of such trial and conviction, within thirty days after sentence, or, in the event of an appeal, within twenty days after the final disposal of the cause upon such appeal." 19 PS 1122.

"Section 3. After the receipt of the said record the Governor of the Commonwealth shall issue his warrant, directed to the warden of the Western Penitentiary, commanding said warden to cause such convict to be executed in said penitentiary, within the week to be named in said warrant, and in the manner prescribed by law." 19 PS 1123.

"Section 4. **Upon the receipt of such warrant the said warden shall, by a written notice under his hand and seal, duly notify the officer having the custody of such convict to deliver such convict to the custody of such warden, and it shall be the duty of such officer to forthwith cause such delivery to be made. Thereupon, and until the penalty of death shall be inflicted, or until lawfully discharged from such custody, said convict shall be kept in solitary confinement in said penitentiary.** During such confinement no person except the officers of such penitentiary, the counsel of such convict, and a spiritual adviser selected by such convict, or the members of the immediate family of such convict, shall be allowed access to such convict without an order of said court or a judge thereof." 19 PS 1124 (Emphasis supplied)

SUMMARY OF ARGUMENT.

Under Sections 1, 2, 3 and 4 of the Act of 1913, supra, 19 PS 1121-1134, the relator lawfully came into the custody of the Warden of the Western State Penitentiary which custody, under Section 4, continues, regardless of the place of detention "until the penalty of death shall be inflicted, or until lawfully discharged from such custody". The Superintendent or Warden of the Philadelphia County Prison, as the case may be, although in control of the present place of the relator's detention, are, in so far as he is concerned, merely the agents of the Warden of the Western State Penitentiary. Since, therefore, the Warden of the Western State Penitentiary has, under the laws of Pennsylvania, the paramount right to the relator's custody he unquestionably should be jointed as a party respondent. He was so joined in the former proceedings in this court at M. 1334 and in the proceedings in the Supreme Court of Pennsylvania. Consistency as well as the law, requires his joinder as a party respondent in this proceeding.

ARGUMENT

1. Under the law of Pennsylvania, the custody of a prisoner convicted of murder and sentenced to

death who has been delivered to the Warden of the Western State Penitentiary is, until the sentence has been executed or he has been lawfully discharged therefrom, in the custody of the Warden of the Western State Penitentiary regardless of the place of confinement.

The provisions of Section 4 of the Act of 1913, supra, 19 PS 1124[2] are so unmistakedly clear that it hardly requires any argumentative exposition of the logical soundness of the asserted proposition. Admittedly, the relator has not been lawfully discharged from the custody of the Warden of the Western State Penitentiary. Strictly speaking, when the judgment of your Honorable Court was affirmed by the Circuit Court of Appeals on April 26, 1950 the Warden of the Western State Penitentiary probably should have immediately returned the relator to the "death house", Rockview, Centre

---

[2] "Section 4. **Upon the receipt of such warrant the said warden shall, by a written notice under his hand and seal, duly notify the officer having the custody of such convict to deliver such convict to the custody of such warden, and it shall be the duty of such officer to forthwith cause such delivery to be made. Thereupon, and until the penalty of death shall be inflicted, or until lawfully discharged from such custody, said convict shall be kept in solitary confinement in said penitentiary. * * *"** (Emphasis supplied.)

County. At that time, however, proceedings in the Supreme Court of the United States to review the judgment of the Supreme Court of Pennsylvania at Misc. Docket 9, No. 302 had either been or were about to be instituted. Consequently, there was a possibility that several months would elapse before the matter was finally adjudicated. The Warden of the Western State Penitentiary was of an opinion that it would be very inhuman to confine the relator in the "death house" for such an indefinite period of time and, therefore, simply allowed him to remain in the Philadelphia County Prison. Such action or inaction, however, engendered as it was by a charitable solicitation for the welfare and interest of the relator, could not possibly operate to divest the Warden of the Western State Penitentiary of the custody which the positive command of Section 4 of the Act of 1913, supra, confers upon him.

Since, therefore, the Warden of the Western State Penitentiary is the legal custodian of the relator, and, since, by hypothesis, the officials in charge of the Philadelphia County Prison are, in so far as this relator is concerned, acting only as his agent, it is submitted he should be made a party respondent in this proceeding.

2. The joinder of the Warden of the Western State Penitentiary as a party respondent will not affect the jurisdiction of this court.

It is difficult to perceive why the relator should object to the allowance of the petition to the Warden of the Western State Penitentiary for leave to intervene as a party respondent unless, out of a desire to avoid some imaginary objection to the assumption of jurisdiction on the merits. Had there been that possibility, the petition would not have been filed for the Commonwealth of Pennsylvania feels that further delay in the termination of this litigation is incompatible with the efficient administration of criminal justice.

Unquestionably the proceeding had to be instituted in the Eastern District of Pennsylvania. Ambers v. Clark, 335 U.S. 188, 68 S.C. 1443 (1948). The allowance of the petition to intervene would present no question concerning this court's jurisdiction over the person of the Warden of the Western State Penitentiary for, by his very action, he is bringing himself within its jurisdiction (Cf. United States ex rel. Goodman v. Roberts (C.C.A. 2, 1946), 152 Fed. 2d 841, 842).[3] Indeed, if the contention made for

---

[3] "* * * The writ was returnable on May 4th. It is clear that prior to that time there had been no valid service of the writ. On the return day an assistant United States attorney made application on behalf of the respondent for an extension of time to file the respondent's return, and stated that the writ had not been served and that custody of the inductee, would

in the first portion of this argument is sound, and it is submitted that it is, intervention by the Warden of the Western State Penitentiary as a party respondent in this proceeding would appear to be essential to the elimination of a possible jurisdictional defect.

---

be disputed. The court granted an extension until May 7, on which date the return was filed and the hearing had. The appellant contends that this application for extension constituted a general appearance and a submission of the respondent to the jurisdiction of the court. Arguendo, we may assume this to be true, but it will not aid the appellant on the issue of custody. A general appearance on May 4, would have only the same effect as actual service at the time, and by that date the inductee was beyond the jurisdiction of the court and no longer subject to Major Roberts' orders, as the facts about to be stated clearly show."

CONCLUSION

Under the Act of 1913, supra, the Warden of the Western State Penitentiary is the legal custodian of the relator, and he should, therefore, be joined as a party respondent in this proceeding.

Respectfully submitted,

COLBERT C. MCCLAIN,
Assistant District Attorney,

JAMES W. TRACY, JR.,
First Asst. District Attorney,

RANDOLPH C. RYDER,
Deputy Attorney General,

HARRINGTON ADAMS,
Deputy Attorney General,

CHARLES J. MARGIOTTI,
Attorney General.

Brief Sur Petition for Leave to Intervene

EXHIBIT 1

In the
Court of Oyer and Terminer and General Jail
Delivery of the County of Philadelphia

February Term, 1948, No. 384
Sur charge of Murder

The Commonwealth of Pennsylvania
vs.
James Smith

And now, Friday February 4th 1949, the sentence of the law is that you, James Smith be taken hence by the Sheriff of Philadelphia County to the jail of that county from whence you came, and from thence in due course to the Western Penitentiary in Centre County, Pennsylvania, and that you there suffer death during the week fixed by the Governor of the Commonwealth, in a building erected for the purpose on land owned by the Commonwealth, such punishment being inflicted by either the warden or deputy warden of the Western Penitentiary, or by such person as the warden shall designate, by causing to pass through your body a current of electricity of intensity sufficient to cause death and

the application of such current to be continued until you are dead.

Charles L. Guerin,
Judge.

In Witness Whereof, I have hereunto set my hand and the seal of the said Court, this 4th day of February A. D., 1948.

Nathan Ciples,
Pro Clerk.

EXHIBIT 2

In the Name and By Authority of the
Commonwealth of Pennsylvania
Executive Department

To Stanley P. Ashe, Esquire,
Warden of the Western Penitentiary, or your successor in office, Greeting:

Whereas, At a Court of Oyer and Terminer and General Jail Delivery held at Philadelphia, in and for the County of Philadelphia, 384 Feb. Term, 1948, a certain James Smith, on the 21st day of September, Anno Domini one thousand nine hundred and forty-eight pleaded guilty to an indictment charging him with murder; whereupon the court determined the degree of the crime to be murder in the first degree, 4th day of February, Anno Domini one thou-

sand nine hundred and forty-nine imposed the sentence of death; such punishment to be inflicted by the Warden or Deputy Warden of the Western Penitentiary by causing to pass through the body of said convict a current of electricity of intensity sufficient to cause death, the application of such current to be continued until said convict is dead.

Now Therefore, This is to command, authorize and require you, the said Stanley P. Ashe, Warden of the Western Penitentiary, as aforesaid, or your successor in office, to cause the sentence of the said Court of Oyer and Terminer and General Jail Delivery to be executed upon the said James Smith within the week beginning Monday, the 26th day of September, Anno Domini one thousand nine hundred and forty-nine, in the manner prescribed by the Act of General Assembly of this Commonwealth, entitled "An Act fixing the penalty for murder of the first degree; regulating the procedure incident to the infliction thereof; prescribing and providing for a place and manner of inflicting said penalty on the grounds of the new Western Penitentiary of this Commonwealth in Centre County," etc., approved the nineteenth day of June, Anno Domini one thousand nine hundred and thirteen, and for so doing this shall be your sufficient warrant.

Given under my hand and the Great Seal of the State, at the City of Harrisburg, this 20th day of

July in the year of our Lord one thousand nine hundred and forty-nine and of the Commonwealth the one hundred and seventy-fourth.

By the Governor:
(s) James H. Duff

(s) Charles M. Morrison,
Secretary of the Commonwealth.

(Seal)

EXHIBIT 3

Western State Penitentiary
of Pennsylvania
Rockview, Pa.

Stanley P. Ashe,
Warden.

Electrocution Building

September 22, 1949

Commonwealth of Pennsylvania

vs.

James Smith

To Mr. F. S. Baldi, Superintendent Philadelphia County Prisons, County of Philadelphia and to any Warden, Prison Keeper or Officer of this

Commonwealth having the custody of James Smith, Greeting:

By virtue of a warrant issued July 20, 1949 by James H. Duff Governor of the Commonwealth of Pennsylvania, commanding me to cause one James Smith to be executed in this institution in the manner prescribed by law, I hereby notify you to forthwith deliver the said James Smith to the Electrocution Building of the Western State Penitentiary of Pennsylvania, Rockview, Center County, Pa., where He shall remain until the penalty of death has been legally inflicted or until lawfully discharged from my custody.

Stanley P. Ashe,
Warden.

By C. C. Rhoads,
Deputy Warden.

(Seal)

EXHIBIT 4

Western State Penitentiary
of Pennsylvania

Electrocution Building

Stanley P. Ashe
Warden

Rockview, Pa.

Brief Sur Petition for Leave to Intervene

State of Pennsylvania
County of Center *ss:*

Before me, a Notary Public in and for the State of Pennsylvania and County of Center, personally appeared Fred S. Baldi, Who, being duly sworn according to law deposes and says: That he is Fred S. Baldi. That he is Superintendent of Philadelphia County Prisons. That the prisoner delivered by him to the custody of the Warden of the Western State Penitentiary is James Smith, and that ~~he~~, Fred S. Baldi is duly authorized by law to deliver the said James Smith to the custody of the Warden of the Western State Penitentiary.

Fred Baldi (Illegible)
Superintendent of Philadelphia County Prisons.

Sworn and subscribed to before me this 24 day of September, 1949.

E. T. Haynes,
Notary Public.

(Seal).

My Commission Expires January 17, 1953.

EXHIBIT 5

Western State Penitentiary of Pennsylvania
Electrocution Building

Rockview, Pa., September 24, 1949

No. 401

Received from Fred S. Baldi, Superintendent of Prisons of the County of Philadelphia, Prisoner James Smith. Plead Guilty to the crime of murder of the first degree and sentenced to be executed in the Electrocution Building of the Western State Penitentiary of Pennsylvania.

Stanley P. Ashe,
Warden.

By C. C. Rhoads,
Deputy Warden.

Attest: M. M. Cobb,
Clerk.

(Seal)

I hereby certify that James Smith was received at the Electrocution Building of the Western State Penitentiary of Pennsylvania on September 24, 1949.

C. C. Rhoads,
Deputy Warden.

EXHIBIT 6

In the District Court of the United States
For the Eastern District of Penna.

M. 1334

United States ex rel. James Smith

vs.

Warden of Western State Penitentiary

Order granting petition for writ of habeas corpus staying execution of sentence of death.

Now, to wit, this twenty-fourth day of September, A. D., 1949, upon consideration of the petition of James Smith, and upon and after hearing in open court, with the Commonwealth of Pennsylvania represented by James W. Tracey, Jr., Assistant District Attorney, it is hereby ordered and decreed that a writ of habeas corpus issue directed to the Warden of Western State Penitentiary, directing that he produce the body of James Smith before the Judges of the United States District Court for the

Eastern District of Pennsylvania on Tuesday, October 4, 1949, at ten o'clock a.m., that execution of the death sentence and all other proceedings be stayed meanwhile, and that the writ of habeas corpus shall be served by counsel for above Relator.

By the Court,
(s) Geo. A. Welsh,
J.

EXHIBIT 7

In the United States District Court
For the Eastern District of Pennsylvania

M.-1334

(Filed Nov. 16, 1949)

United States ex rel. James Smith

vs.

Warden of the Philadelphia County Prison

and

Warden of the Western State Penitentiary

JUDGMENT

And now, to wit, the 16th day of November, 1949, this cause having been fully heard and determined, the writ of habeas corpus heretofore issued is discharged and the relator, James Smith, is remanded to custody.

By the Court,
(s) Kirkpatrick, *Ch. J.*

EXHIBIT 8

In the United States District Court
For the Eastern District of Pennsylvania

Misc. No. 1334

United States of America ex rel. James Smith
vs.
Warden of Western State Penitentiary

ORDER

Before Kirkpatrick, *Ch. J.*

And now, November 22nd, 1949, an appeal having been taken from the judgment of this Court dis-

charging the writ of habeas corpus heretofore issued, pending review of the decision of this Court the relator shall be detained in the custody of Robert J. Beveridge, Warden of the Philadelphia County Prison.

By the Court,
Attest:
(s) Leo A. Lilly,
Deputy Clerk.

VII.

PETITION BY THE ATTORNEY GENERAL OF PENNSYLVANIA TO CONVENE A FULL BENCH

United States District Court for the Eastern District of Pennsylvania

No. 1408

United States of America ex rel. James Smith

vs.

Dr. Frederick S. Baldi, Superintendent, Philadelphia County Prison and J. W. Claudy, Warden of the Western State Penitentiary.

PETITION TO CONVENE A FULL BENCH

To the Honorable, the Judges of Said Court:

The petition of Dr. Frederick S. Baldi and J. W. Claudy, by Charles J. Margiotti, Attorney General of Pennsylvania, respectfully represents:

1. That they are the respondents in the above captioned proceeding.

2. That the relator who is under a sentence of death imposed by the Court of Oyer and Terminer of Philadelphia County at No. 384 February Term, 1948, made the prior application for a writ of habeas corpus to your Honorable Court at No. M. 1334 upon which a writ of habeas corpus was issued and the execution stayed.

3. That the proceedings at No. M. 1334 were heard and determined by a full bench composed of all the District Judges of the Eastern District of Pennsylvania.

4. That following the proceedings at No. M. 1334 dismissing the writ which was affirmed by the United States Court of Appeals for the Third Circuit at No. 10141, habeas corpus proceedings challenging the validity of the judgment of the Court of Oyer and Terminer of Philadelphia County at No. 384 February Term, 1948, were instituted in the Supreme Court of Pennsylvania at Misc. Docket 9, No. 302 on the identical grounds alleged in the instant proceeding.

5. That the Supreme Court of Pennsylvania, after careful consideration of the relator's allegations dismissed the petition, opinion reported at 364 Pa. 93, 71 A. 2d 107.

6. That the relator then applied to the Supreme Court of the United States at No. 70 October Term,

1950 for a writ of certiorari to review the judgment of the Supreme Court of Pennsylvania at Misc. Docket 9, No. 302.

7. That on Monday, October 9, 1950, the Supreme Court of the United States denied relator's application for a writ of certiorari to the Supreme Court of Pennsylvania, whereupon he immediately made an application to your Honorable Court on the identical grounds alleged in the Supreme Court of Pennsylvania at Misc. Docket 9, No. 302, for a writ of habeas corpus.

8. That Honorable George A. Welsh, District Judge, on the same day, to wit, the 9th day of October, 1950, issued a rule to show cause why a writ should not issue, said rule being returnable before your Honorable Court on Wednesday, October 18, 1950, at 10:00 a.m.

9. That the petitioners verily believe that the fundamental issue involved in this proceeding, namely, whether, in the circumstances, an application for a writ of habeas corpus should be entertained by the District Court warrants the consideration of all the members of your Honorable Court.

Wherefore, the petitioners pray your Honorable Court to convene a court composed of all the members of the District Court for the Eastern District of Pennsylvania or, in the alternative, so many of them as your Honorable Court may feel the situa-

tion warrants and demands. And they will ever pray, etc.

(s) CHARLES J. MARGIOTTI,
Attorney General of Pennsylvania,
By: (s) RANDOLPH C. RYDER,
Deputy Attorney General.

Commonwealth of Pennsylvania,
County of Dauphin ss:

Before me, a Notary Public in and for said State and county, personally appeared Randolph C. Ryder, Deputy Attorney General of Pennsylvania, who being duly sworn according to law, deposes and says that the foregoing facts are true and correct to the best of his knowledge, information and belief.

(s) RANDOLPH C. RYDER,
Deputy Attorney General of Pennsylvania.

(Jurat)

VIII.

ANSWER TO PETITION TO CONVENE A FULL BENCH

In the United States District Court for the Eastern District of Pennsylvania

No. 1408

United States of America ex rel. James Smith

v.

Dr. Frederick S. Baldi, Superintendent, Philadelphia County Prison

ANSWER TO PETITION TO CONVENE A FULL BENCH

To the Honorable, the Judges of Said Court:

The Answer of James Smith, Relator, by his attorney, Thomas D. McBride, respectfully represents:

1. It is admitted that Dr. Baldi is a Respondent but it is denied that J. W. Claudy is a Respondent or has officially or personally any rights appertaining to this case.

2. Admitted.

3. Denied as averred. All of the testimony and other evidence was heard by and before Honorable George A. Welsh only.

4. It is admitted that the proceedings were instituted. It is denied that the grounds were identical. On the contrary it is averred that the petition filed in the Supreme Court of Pennsylvania raised additional grounds, including grounds pertaining to the fact that Relator was deprived of the effective assistance of counsel at his arraignment and grounds pertaining to the alteration by some one of the endorsements on the bill of indictment on which Relator had been tried.

5. It is admitted that the petition was dismissed. Relator has no knowledge as to whether "careful consideration" was given to Relator's allegations. It is alleged that the Supreme Court of Pennsylvania unwarrantedly acted on the basis of a copy of the notes of testimony taken in this United States District Court, picking and choosing therefrom matters purporting to support the decisions of the Supreme Court of Pennsylvania. There have been no findings of fact as to any disputed issue in this case by any competent tribunal.

6. Admitted.

7. Admitted.

8. Admitted.

9. Denied. On the contrary it is averred that there is nothing involved in this case which makes the case one which cannot be disposed of by a single judge, like any other case before this Court. There are disputed issues of fact which must be heard and resolved before the questions of law can be decided unless the averments of Relator's petition are deemed to be fully admitted. Relator does not know of any precedent for disposing of such issues by a full bench which is usually convened only for the disposition of questions of law.

Wherefore, Relator prays your Honorable Court not to grant the prayer of the petition.

JAMES SMITH,
By THOMAS D. McBRIDE.

Commonwealth of Pennsylvania,
County of Philadelphia ss:

Thomas D. McBride, being duly sworn according to law, deposes and says that the facts set forth in the foregoing Answer are true and correct.

(s) THOMAS D. McBRIDE.

Sworn to and subscribed before me this 26th day of October, A. D. 1950.

Martha A. Rau,
Notary Public.

My commission expires January 7, 1951.
(Seal)